84-1604

No.

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In The Supreme Court of the United States

October Term, 1984

JUSTO GUZMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

1. Whether the Speedy Trial Act of 19 U.S.C. Section 3161(c)(2) must be applied per se., or depends instead upon the extent of the prejudice suffered by the defendant who is denied a continuance of 30 days prior to the commencement of trial upon an indictment?

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OCTOBER TERM, 1984

JUSTO GUZMAN,

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UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION IN THE COURT BELOW

The decision of the United States Court of Appeals for the Second Circuit, which gives the reasons for the affirmance *in part* of the judgment of conviction, is set forth in the appendix at pages A-1-14.

GROUNDS FOR JURISDICTION OF THIS COURT

Judgment of conviction was entered in the United States District Court for the Eastern District of New York on July 27, 1984, and the order of the United States Court of Appeals for the Second Circuit which affirmed in part and reversed in part the judgment of

conviction was entered on February 12, 1985. This Court has jurisdiction to review the judgment of the Circuit Court by Writ of Certiorari pursuant to 28 U.S.C. Section1254.

CONSTIUTIONAL PROVISIONS INVOLVED

This case involves Amendments V and VI of the United States Constitution.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury,***not be deprived of life, liberty, or property, without due process of law***.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISION INVOLVED

This case involves 18 U.S.C. Section 3161(c)(2) which provides that:

"Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date in which the defendant first appears through counsel or expressly waives counsel

and elects to proceed pro. se."

STATEMENT OF FACTS

This appeal raises for consideration the interpretation of a statute (18 U.S.C. Section 3161 (c)(2) which has assumed an ever growing importance to the orderly administration of justice in our federal courts. See, *Williford v. United States*, __U.S.__, 105 S. Ct. 270, 53 U.S.L.W. 3264, October 9, 1984, *United States v. Harris*, 724 F. 2d 1452, 1455 (9th Cir. 1984); *United States v. Horton*, 676 F. 2d 1165, 1169-70(7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), *United States v. Todisco*, 667 F. 2d 255, 260 (2d Cir. 1981), *Cert. denied*, 455 U.S. 906 (1982).

The petitioner was indicted for conspiracy to possess with intent to distribute cocaine and for possession of, with intent to distribute, approximately one and one-half kilograms of cocaine. 21 U.S.C. Sections 841 (a) (1), 846 (1982). He was sentenced to 15 -year terms of imprisonment on each of the two counts, to run consecutively, to two fines of $25,000, and to a special parole term of life. The petitioner was forced to trial within two days of the filing of a superseding indictment which enlarged the period of the conspiracy charged from two days to two years.

In this case the Court below declined a per se. application of the Speedy Trial Act of 18 U.S.C. Section 3161 (c) (2). Instead, it predicated its determination upon a finding of severe prejudice in reversing petitioner's conviction for conspiracy and *de minimis* prejudice in affirming his conviction for possession of cocaine with intent to distribute. It also has treated each count of the instant indictment flowing from one set of events as separate entities.

We incorporate by reference the facts of this case as set forth in the annexed opinion of the Court below (A-1-14)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT FOR TWO REASONS: (1) THERE IS CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS ON THE ISSUE HERE PRESENTED; AND (2) THE SECOND CIRCUIT DECISION MISINTERPRETS THE CONGRESSIONAL INTENT ON THE ISSUE HERE PRESENTED.

There is a direct conflict among the circuits in the application of section 3161(c). *See Williford v. United States*, __U.S.__, 53 U.S.L.W. 3264 (October 9, 1984) (dissenting opinion of Justice White). In the instant case, the Second Circuit, following the Seventh Circuit[1] declined to apply the per se rule of the Ninth Circuit.[2]

The Ninth Circuit's per se rule requires reversal if a defendant is brought to trial less than thirty days after a superseding indictment is filed, without more. The Second Circuit's analysis in this case based upon the degree of prejudice attendant in a premature retrial led it to make an artificial distinction between the conspiracy count and the substantive count of the

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[1]United States v. Horton, 676 F.2d 1165, 1169-70 (7th cir. 198), *cert. denied*, 459 U.S. 1201 (1983).

[2]*United States v. Harris*, 724 F.2d 1452 (9th cir. 1984); *United States v. Arkus*, 675 F.2d 245, 247-248 (9th cir. 1982); *accord United States v. Wooten*, 688 F.2d 941, 951 (11th cir. 1982).

superseding indictment. The plain language of the section and the underlying policy considerations, make it clear, that Congress did not intend that so basic a due process right as adequate time to prepare a defense to turn upon the vagaries of such sophistic distinctions, *and* the instant case emphasizes the need for this court's intervention and declaration of a *per se* rule.

The Ninth Circuit has held that §3161(c)(2) guarantees that a defendant not be "forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which defendant ultimately goes to trial*" (emphasis in original), and "any preparation period shorter than thirty days is inadequate *per se*" *United States v. Harris*, 724 F.2d 1452, 1455 (9th cir. 1984). In contrast, the Second Circuit, in the instant case, considered whether, for each count the superseding indictment markedly changed the original indictment so as to prejudice appellant of his preparation of an adequate defense, and found prejudice in the defense of the conspiracy count but not the underlying substantive count. Notwithstanding the fact that crucial evidence was admitted solely because of the improper joinder of the conspiracy count (see A-10).[3]

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[3]The Second Circuit noted that the hearsay statements of appellant's co-defendants would not have been "relevant" if appellant had not been charged on the conspiracy count. (A-10) However, the court concluded, the "overwhelming evidence supporting [appellant's] conviction for possession" rendered its admission harmless. (A-10) Ironically, in tallying the "overwhelming evidence," the court included the drug ledger and appellant's statements to detective Robinson after his arrest. (A-10) However, this evidence was directly related to the charge of conspiracy (A-11) and would also have been irrelevant had there been no joinder of the conspiracy count.

The artificial separation of these counts, and the resultant inapposite conclusion, highlight the attendant weaknesses and inconsistencies of an analysis based upon prejudice.

Section 3161(c)(2) provides that unless a defendant "consents in writing to the contrary, the trial shall not commence less than thirty days from appeals through counsel." 18 U.S.C. §3161(c)(2). The underlying policy considerations of this section, read with its clear and unambiguous language, require a per se application of this rule. This section was designed to protect the basic due process right of a defendant in having adequate time in which to prepare a defense. S. Rep. No. 96-212, 96th Cong., 1st Sess., p.32, it specifically states that "the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information . . . thereafter . . . filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode . . . " 18 U.S.C. §3161(d)(1). Any interpretation of this section that permits a court to discriminatorily distinguish between two counts of a superseding indictment which arose from the same offense as the original indictment, is in conflict with the plain language of the section, and the clear intent of Congress.

Moreover, the speedy trial act was intended by Congress "to provide a uniform national rule regarding trial scheduling and delay. *Williford v. United States, supra.* An analysis based upon prejudice requires a case by case evaluation and creates intra as well as inter Circuit variations.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully Submitted,

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[CORRECTED COPY]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 444 — August Term, 1984

(Argued: Nov. 20, 1984 Decided: Feb. 12, 1985)

Docket No. 84-1283

UNITED STATES OF AMERICA,

Appellee,

—against—

JUSTO GUZMAN,

Appellant.

Before:

LUMBARD, MANSFIELD and CARDAMONE, *Circuit Judges.*

Appeal from a judgment of conviction, Eastern District of New York, Platt, *J.*, for conspiracy to possess with intent to distribute and for possession of, with intent to distribute, approximately one and one-half kilograms of cocaine. 21 U.S.C. §§ 841(a)(1), 846 (1982). Conviction on Count II affirmed. Conviction on Count I reversed.

WILLIAM LUPO, ESQ., Brooklyn, N.Y. (Norman A. Olch, Esq., New York, N.Y., of counsel) *for Appellant.*

CAROL B. SCHACHNER, Assistant United States Attorney, Brooklyn, New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York, Allyne R. Ross and Jane Simkin Smith, Assistant United States Attorneys, Brooklyn, New York, of counsel), *for Appellee.*

LUMBARD, *Circuit Judge:*

Justo Guzman appeals from his conviction, entered after a jury trial in the Eastern District, for conspiracy to possess with intent to distribute cocaine and for possession of, with intent to distribute, approximately one and one-half kilograms of cocaine. 21 U.S.C. §§ 841(a)(1), 846 (1982). Guzman was sentenced to 15-year terms of imprisonment on each of the two counts, to run consecutively, to two fines of $25,000, and to a special parole term of life. Guzman claims error in five respects: (1) he was forced to go to trial less than 30 days after the filing of the indictment on which he was tried; (2) statements by a non-testifying co-defendant were improperly admitted against him at trial; (3) statements made by a police officer during interrogation, which asserted Guzman's connection to a large drug ring, were erroneously admitted at trial; (4) the court gave two supplementary "conscious avoidance" charges to the jury during its deliberations; and (5) Guzman was sentenced to the statutory maximum.

The appellant was forced to trial on the conspiracy count only one day after the filing of a superseding indictment which expanded the scope of the conspiracy from a time period of two days—March 21 and 22, 1984—to a

period covering almost two years, from April 12, 1982 to March 22, 1984. As we conclude that, in view of the substantive change in the conspiracy count charged in the superseding indictment, Guzman should not have been compelled to stand trial on that count until a reasonable time after this indictment was filed, we reverse his conviction as to Count I, the conspiracy charge.

We find no error regarding Guzman's conviction on Count II, the possession count, and accordingly, affirm that conviction.

I.

Guzman, with Seiichi Kawai and Dora Susana Forero, was first brought to trial on June 4, 1984, on a March 28 indictment which charged, in Count I, that these three, "together with others known and unknown," had conspired, between and including March 21 and 22, 1984, to distribute cocaine in violation of Title 21, U.S.C. § 841(a)(1). Count II charged all three with possession, on or about March 22, 1984, of one and one-half kilograms of cocaine.

On the second day of trial, June 5, Judge Platt declared a mistrial, on motion of defendants' counsel, because of the prosecutor's opening remark that Guzman was a member of the Victor Crespo cocaine smuggling organization. The statement was improper because the prosecutor could not substantiate this assertion with competent evidence at trial. Later that same day, the government announced that it would seek a superseding indictment, expanding the scope of the alleged conspiracy, to avoid any conceivable objection to the introduction of a ledger that recorded drug transactions dating back to 1982.

The superseding indictment, filed June 6, charged the three defendants with conspiring together from April 12, 1982 to March 22, 1984, an enlargement of the duration of the alleged conspiracy from two days to almost two years. The second count charged only Guzman with the March 22, 1984 possession of one and one-half kilograms of cocaine.

Over the objection of defense counsel, the district court ordered the defendants to stand trial again the next day, June 7. On June 15, after two days of deliberation, the jury found Guzman guilty on both counts. The jury was then discharged, after reporting that they could not agree on a verdict with regard to the two remaining defendants, who were convicted at a subsequent trial. As Guzman makes no claim that the evidence was insufficient to support his conviction, nor that the March 22, 1984 seizures of records, drug paraphernalia, and cocaine were illegal, a brief summary of the government's case will serve for discussion of Guzman's arguments on appeal.

II.

The government's case was presented through the testimony of 10 witnesses and the evidence seized pursuant to search warrant. Acting on a tip that the appellant was a cocaine distributor for the Victor Crespo organization, an international drug smuggling outfit, New York Drug Enforcement Task Force (DETF) agents placed Guzman under surveillance. On March 21, 1984, agents observed an apparent transaction between Guzman, Kawai, and Forero. According to the testimony of DETF agents, Kawai and Forero, who remained together after the suspicious encounter, were followed and then approached by officers. As the agents neared, Forero

advised Kawai, in Spanish, not to worry, but to tell her how much money they had and whether they could allege that the money came from a land sale. When the officers examined the contents of a bag and purse, with the defendants' consent, they found approximately $240,000 in cash. The officers testified that during this encounter, Forero repeatedly asked Kawai, again in Spanish, to come up with an explanation for the money. Kawai and Forero were taken to headquarters and arrested.

A search, pursuant to warrant, of a Bayside, Queens apartment at 212-10 43rd Avenue, which was leased by Guzman, yielded 1203 grams of 99.4% pure cocaine and 53.5 grams of 93.2% pure cocaine—the approximately one and one-half kilograms of cocaine charged in the indictment—a heat tester and field test kit for narcotics, a triple-beam scale, and an electric money counter. Later that day, execution of a search warrant at an apartment at 353 E. 72nd Street, where Guzman had been observed, produced 100 plastic bags, numerous shoe boxes with handwritten notations, and a large metal safe.

The safe was taken to headquarters. Upon the request of Detective Robinson, a DETF agent, it was opened by Guzman, who had been arrested earlier that day. Inside the safe, detectives found a blue ledger chronicling the distribution of approximately 1900 pounds of cocaine and the collection of about $35 million between April 1982 and March 1984. The notebook contained numerous references to "Japones," "Japon," and "Sussy," aliases, the government asserts, for Kawai and his wife, Forero.

At trial, Robinson testified that after he examined the contents of the safe, he asked the defendant whether

he would be willing to cooperate. When Guzman answered affirmatively, Robinson told him that he was familiar with the organization that Guzman was working for and that it would be difficult to lie. According to Robinson, he then asked Guzman when he had last seen Chepe, not otherwise identified at trial, but apparently a reference to Victor Crespo. Guzman responded that he had last seen Chepe two years ago. When asked about one Fernando Carmona, Guzman told the detective he was in Miami, as far as Guzman knew. Robinson further testified:

> He said to me at that point, well, he said, you know everything about this organization, what do you need me for.

The court admitted Robinson's testimony over Guzman's objection.

Guzman offered no evidence in his defense.

III.

Trial on the Superseding Indictment.

Over the strenuous objections of Guzman's counsel, the district court ordered defendant Guzman to stand trial on June 7, 1984, one day after the filing of a superseding indictment.

By its terms, 18 U.S.C. § 3161(c)(2) provides that:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

Some circuits have interpreted this provision to guarantee that a defendant will not be forced to trial less than 30

days from the date on which he first appears on a superseding indictment, however minimal the differences between the superseding indictment and the original. *See e.g., United States* v. *Harris*, 724 F.2d 1452, 1455 (9th Cir. 1984). As we stated in *United States* v. *Todisco*, 667 F.2d 255, 260 (2d Cir. 1981), *cert. denied*, 455 U.S. 906 (1982), however, we read the Speedy Trial Act, 18 U.S.C. § 3161(c), as not divesting a district court of its discretion to grant or refuse a continuance, where this discretion is exercised in keeping with the policies underlying specific provisions of the Act. When a superseding indictment makes only insubstantial changes in an original indictment, so that a defendant has not been deprived of adequate time to prepare a defense, we hold that, consistent with 18 U.S.C. § 3161(c)(2), a district court may exercise its discretion in proceeding to trial without further delay. *See United States* v. *Horton*, 676 F.2d 1165, 1169-70 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983).

However, we cannot agree with the government's contentions that the changes in Guzman's superseding indictment were insubstantial and that Guzman was therefore not prejudiced because forced to proceed immediately to trial on the conspiracy count. Even though the same evidence may have been presented to prove the existence of a two-year conspiracy as would have been used on the indictment charging a conspiracy of only two days, it cannot be disputed that in the proper preparation of a defense to the charge of a two-year conspiracy, counsel was required to review a far longer period of activity with his client.

By focusing on the prosecution's case and the fact that the evidence introduced at trial on the superseding

indictment was the same as that which the government had expected to use at the first trial, the district court neglected to take into account the impact that the second indictment might have had on defense theories of the case, and the resultant need for a more extended preparation. Guzman's counsel had specifically indicated to Judge Platt that he needed more time to obtain proof that Guzman was not in the country until after the enlarged conspiracy period began. Regardless of the government's representation that it would offer no new evidence at the second trial, Guzman was entitled to the opportunity to pursue this new line of defense, which would not have been available to him under the original indictment. The district court abused its discretion in not granting defendant Guzman a reasonable continuance to prepare his defense to the charge of participation in a two-year conspiracy. Guzman's conviction on the conspiracy count is, accordingly, reversed.

The considerations which compel us to reverse the conviction on Count I do not apply to Guzman's conviction on Count II, the possession count. Both indictments charged Guzman with the March 22 possession of one and one-half kilograms of cocaine, a charge amply supported by the evidence, which included the cocaine seized from Guzman's apartment. As the deletion of co-defendants Kawai and Forero from the possession count in the second indictment changed neither the prosecution's case nor conceivable defenses by Guzman, the defendant could not possibly have been prejudiced because required to proceed to trial on this charge. Finally, because the great bulk of the evidence adduced at trial, with the exception discussed below, was relevant and admissible as to Count II, Guzman could not have been prejudiced by the improper joinder of the conspiracy count.

IV.

None of the remaining issues raised by Guzman require reversal of the conviction on Count II.

1. *Statements of Co-conspirators.*

Guzman contends that the district court erroneously permitted testimony regarding the March 21 conversation between his co-defendants, Forero and Kawai, to be admitted, without limiting instruction, at trial. The defendant argues ,that Forero's statements, which concerned what Forero and Kawai should tell the DETF agents about the money in the bag and purse, constituted inadmissible post-conspiracy declarations. These statements, Guzman asserts, did not come within the hearsay-conspiracy exception, applicable only to declarations made while the conspiracy was in progress, and effectively deprived the defendant of his right to confront the declarants.

Forero's statements to Kawai, which were uttered in Spanish, as they stood beside a cab on Park Avenue, were obviously directed at concealment of the nature of their criminal activity—a concealment vital to the progress of the conspiracy itself. The statements were first overheard as DETF agents approached the co-defendants, prior to any effective arrest. Although Guzman at no time requested a limiting instruction, even though the issue was brought to his counsel's attention, Judge Platt correctly instructed the jury that statements made by co-conspirators could be considered as evidence against other defendants only if these defendants were found to be members of the conspiracy and the statements were made in furtherance of the criminal scheme. Fed. R. Evid. 801 (d)(2)(E).

We note, however, that this evidence would not have been relevant if Guzman had not been charged on the conspiracy count. In light of the overwhelming evidence supporting Guzman's conviction for possession, which included the cocaine and drug paraphernalia seized from his apartment, Guzman's own statements after arrest, and the drug ledger, we find that any prejudice to Guzman in the admission of irrelevant evidence was harmless.

2. *Conversation with Detective Robinson.*

Guzman also challenges the admission, at trial, of Detective Robinson's testimony of the conversation in which the detective told Guzman that he was familiar with the organization that Guzman was working for and spoke with Guzman concerning the whereabouts of individuals apparently connected to this organization. Guzman contends that his responses to Robinson's questions —that he had last seen Chepe two years ago, that Fernando Carmona was in Miami, as far as he knew—cannot be construed as admissions, admissible under Rule 801 (d) (2) (A), Fed. R. Evid., without assuming the truth of Detective Robinson's declaration that he was familiar with an organization of which Guzman was a member. He claims that this statement was not an admission of complicity in any drug smuggling organization, but merely evidence of Robinson's state of mind. We disagree.

At the police station, after the safe had been opened and the blue ledger revealed, Robinson asked Guzman if he wished to cooperate. When Guzman replied that he did, Robinson warned him that he knew of the organization about which he would be questioning Guzman and that, consequently, it would be difficult to lie. After

Guzman was questioned as to the whereabouts of two persons, the defendant stated, "[Y]ou know everything about this organization, what do you need me for[?]" Guzman's statements were clearly admissible under Fed. R. Evid. 801(d)(2)(A); Robinson's questions were introduced, not for the truth of what he asserted, but to render Guzman's answers intelligible. The jury, given no other information as to the identity of Chepe, Carmona, or the organization, was certainly permitted to consider Guzman's statements, for what they were worth, as an admission of knowledge of and involvement in an organization inferentially connected to the drug ledger—with its chronicle of large-scale cocaine distribution.

3. *Jury Instructions.*

Guzman next contends that the court committed reversible error by giving two "conscious avoidance" charges during jury deliberations that, according to the defendant, relieved the government of the necessity of proving essential elements of the conspiracy—specific intent, willful participation, or guilty knowledge. Though we need not address the issue, given our reversal of the conspiracy conviction, we do so in order to dispel the possibility of any conceivable prejudice with regard to Guzman's conviction on Count II.

The conscious avoidance instruction tells the jury that, if proven beyond a reasonable doubt, it may find that a defendant was aware of the unlawful character of his conduct, and deliberately refused to learn the specific facts, where the circumstances surrounding the unlawful acts were such that the defendant would necessarily have been apprised of the high probability that he was committing a crime. Here, the instruction was given in re-

sponse to inquiries from the jury regarding whether, for a finding of conspiracy, the government need prove that defendants were aware that they were dealing in cocaine, specifically, and whether they need know that the money seized was the proceeds from sale of a controlled substance.

Judge Platt correctly instructed the jury as to the essential elements of a conspiracy prior to the commencement of jury deliberations. On the next day, in response to the jury's query regarding proof that defendants knew they were dealing in cocaine, the court repeated the general requirement that the government establish that one or more persons, including one of the defendants, formed and participated in a conspiracy to distribute and possess, with intent to distribute, cocaine.

With respect to the knowledge of individual members of the conspiracy, the court continued:

> Before a jury may find a defendant or any other person has become a member of the conspiracy the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member wilfully participated in the unlawful plan with the intent to advance or further some object or person (sic) of the conspiracy. . . .
>
> And, with that by way of background, in answer to your question, your specific question, one need not know that the precise nature of the narcotics involved (sic). One must know . . . that it was a controlled substance, *i.e.*, narcotic type substance.

Over the objection of defense counsel, the court then made the following statement, which Guzman characterizes as prejudicial:

> If the government proves beyond a reasonable doubt that a defendant was aware of the high probability that the substance that was being carried or dealt in was the controlled substance and deliberately refused to learn the facts, the government shall have sustained the burden of proving guilty knowledge . . . .

This instruction was followed by a further admonition that proof of negligence, mistake, or plain foolishness on the part of the defendant did not prove guilty knowledge. Upon the jury's second request for a clarifying instruction, this charge was substantially repeated, with a reminder that the supplemental charge should be understood in the context of the instruction as a whole.

At the outset of both challenged supplemental charges, Judge Platt repeated his instruction that the government was required to prove, with respect to each defendant, willful participation in the unlawful plan, with specific intent to further its criminal objective. After—and only after—reiterating the government's burden of proof on this issue, the district court correctly instructed the jury as to a quite distinct matter—the knowledge of individual defendants with regard to the specific details of the conspiracy's operation.

As reflected by the jury's failure to agree on a verdict as to Kawai and Forero, it seems obvious that the jury was concerned with whether these two had acted with sufficient knowledge of Guzman's business to support their conviction for conspiracy. Since the surrounding circumstances were such that reasonable persons could have concluded that the circumstances alone should have apprised defendants of the unlawful nature of their conduct, the charges on conscious avoidance were proper and re-

sponsive. *United States* v. *Mohabir*, 624 F.2d 1140, 1154 (2d Cir. 1980).

4. *The Sentence.*

The sentence of 15 years on the possession count was within the statutory limit. We see no reason to disturb it. In view of the reversal of Guzman's conviction on the conspiracy count, there is no need to discuss the propriety of the court's imposition of consecutive 15-year terms of imprisonment.

Guzman's conviction on Count II, the possession count, is affirmed; his conviction on Count I is reversed.

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No. 84-1604

In the Supreme Court of the United States

OCTOBER TERM, 1984

JUSTO GUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1604

JUSTO GUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the defense preparation period provision of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), prohibits commencement of trial within 30 days of a defendant's arraignment on a superseding indictment even as to a substantive offense count in which the only change effected by the new indictment is the deletion of the names of two co-defendants.

1. On March 28, 1984, an indictment was returned by the grand jury in the United States District Court for the Eastern District of New York charging petitioner and two others with conspiring on March 21 and 22, 1984, to distribute cocaine, in violation of 21 U.S.C. 846, and possession of one and one-half kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1). Trial commenced on June 4, 1984. During the prosecutor's opening statement, he alleged that petitioner was a member of the Victor Crespo cocaine smuggling organization. The following day, the district court declared

a mistrial on the ground that the prosecutor could not prove this allegation with competent evidence. Pet. App. A3.

Following the mistrial the prosecution secured a superseding indictment that expanded the duration of the conspiracy charged in Count I to encompass 1982 and 1983. This change was made to avert any possible objection to reception in evidence of a ledger kept by petitioner that recorded drug transactions dating back to 1982. The superseding indictment did not change the possessory offense charged in Count II of the original indictment in any respect except that the names of petitioner's two co-defendants were dropped.

Denying the request of defense counsel for a continuance, the district court commenced a jury trial on the superseding indictment on June 7, 1984. Petitioner was convicted on both the conspiracy and the possession counts.[1] He was sentenced to consecutive terms of 15 years' imprisonment and to cumulative fines of $25,000 on each count. A special parole term of life was imposed on the substantive charge. The court of appeals reversed the conspiracy count but affirmed the substantive count.

2. The evidence at trial showed that DEA agents who had been watching petitioner, a suspected cocaine trafficker, saw him engage in what appeared to be a narcotics transaction with his co-defendants, Seiichi Kawai and Dora Susana Forero. Afterwards, the agents stopped Kawai and Forero. Forero begged Kawai in Spanish to give the agents an innocent explanation for the large amount of cash ($240,000) that they were carrying. After the agents discovered the cash, petitioner, Forero and Kawai were arrested.

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[1]The jury was unable to reach a verdict with respect to petitioner's co-defendants. They were subsequently tried again and convicted.

Thereafter, petitioner's apartment was searched pursuant to a warrant and one and one-half kilograms of cocaine was found, along with narcotics paraphernalia and a money counter. The agents also searched a second apartment frequented by petitioner and found, inter alia, a large metal safe. Subsequently, at the DEA office, petitioner opened the safe for the agents. Inside was a ledger recording cocaine transactions spanning a two-year period that aggregated over $35 million.

3. The court of appeals reversed petitioner's conspiracy conviction on Speedy Trial Act grounds, but affirmed his conviction for possession of cocaine. The court held that Section 3161(c)(2) of the Speedy Trial Act does not guarantee a defendant a second 30-day defense preparation period following the return of a superseding indictment.[2] Instead, the court held, the district court has discretion to grant or refuse a continuance following a superseding indictment. Moreover, the court reasoned (Pet. App. A8):

> Both indictments charged [petitioner] with the March 22 possession of one and one-half kilograms of cocaine, a charge amply supported by the evidence, which included the cocaine seized from [petitioner's] apartment. As the deletion of co-defendants Kawai and Forero from the possession count in the second indictment changed neither the prosecution's case nor conceivable defenses by [petitioner,] the defendant could not possibly have been prejudiced because required to proceed to trial on this charge. Finally, because the great bulk of the evidence adduced at trial,

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[2] 18 U.S.C. 3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

with the exception discussed below, was relevant and admissible as to Count II, [petitioner] could not have been prejudiced by the improper joinder of the conspiracy count.

4. The court below correctly held that Section 3161(c)(2) of the Speedy Trial Act does not guarantee a new 30-day preparation period following the return of a superseding indictment. This issue, however, is now pending before the Court in *United States* v. *Rojas-Contreras*, cert. granted, No. 84-1023 (Feb. 19, 1985). We have sent petitioner a copy of our brief in *Rojas-Contreras*, which addresses the application of the trial preparation provision to superseding indictments. Although the Court may wish to hold this petition pending disposition of *Rojas-Contreras*, we submit that such action is not necessary.[3]

This case is factually distinguishable from *Rojas-Contreras*. In *Rojas-Contreras*, the original indictment charged the defendant with illegal entry into the United States having been convicted on or about December 17, 1981, of the same offense. Thereafter, a superseding indictment was returned, which changed the date of Rojas-Contreras's prior conviction from December 17 to December 7, 1981. Trial began four days later, and Rojas-Contreras was convicted as charged. The Ninth Circuit reversed the conviction, holding that under Section 3161(c)(2), the defendant was entitled to a new 30-day preparation period following his arraignment on the superseding indictment.

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[3]After granting review in *Rojas-Contreras*, this Court denied certiorari in *Rush* v. *United States*, No. 84-685 (Feb. 25, 1985), and *Yamanis* v. *United States*, No. 84-1261 (May 13, 1985), each of which raised a related issue, namely, whether a new defense preparation period is required following substitution of counsel.

Thus, in *Rojas-Contreras*, there was technically a change — albeit an insignificant one — in the charge on which the defendant was brought to trial. In contrast, here petitioner faced the identical substantive charge before and after the superseding indictment was returned. The only change in Count II in the superseding indictment was the deletion of Kawai and Forero as co-defendants. But this deletion did not affect the charge against petitioner in any way. It is therefore unclear whether petitioner's conviction on the possession count would have been reversed in the Ninth Circuit. In any event, petitioner does not suggest any reason why the policy of the Speedy Trial Act supports a reversal of his conviction on the possession count. There is no claim that the return of the superseding indictment in any way prevented him from being ready for trial on the appointed date. Indeed, any such claim would be frivolous given that petitioner had already once commenced trial on the possession count.

Even if this Court were to hold in *Rojas-Contreras* that *every* superseding indictment automatically triggers a new defense preparation period — a result rejected to date by the First, Second, Fifth, Sixth and Seventh Circuits[4] — reversal would not be justified here. We argue in our brief in *Rojas-Contreras* (at 39-47) that, contrary to the apparent view of the Ninth Circuit, violations of Section 3161(c)(2) can be harmless. See Fed. R. Crim. P. 52(a). As the court below found (Pet. App. A8), petitioner "could not possibly have been prejudiced because required to proceed to trial" on the possession offense fewer than 30 days after the superseding indictment was returned. His defense to the possession charge was not altered by the new indictment, and the

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[4]In addition to the cases cited in our brief in *Rojas-Contreras* (at 9 n.6), see *United States* v. *Gallo*, No. 83-3288 (6th Cir. May 29, 1985), slip op. 29-34.

evidence of his guilt was overwhelming — the cocaine was found in his apartment.[5] Petitioner has wholly failed to show how an additional 30 days of preparation time could have altered his prospects for an acquittal. Accordingly, whether or not Section 3161(c)(2) was violated here, petitioner's conviction must stand.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JUNE 1985

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[5]Petitioner does not take issue with the court of appeals' conclusion that he was in no respect prejudiced by the district court's failure to continue his trial on the possession count. Petitioner does quarrel (Pet. 5 & n.3) with the court of appeals' separate conclusion (Pet. App. A8) that petitioner could not have been prejudiced by the joinder for trial of the possession count with the conspiracy count, as to which the court of appeals concluded a continuance should have been granted. Petitioner criticizes the court of appeals' assessment of the admissibility of certain evidence — the drug ledger and certain post arrest statements by petitioner — as to the possession offense. But even if this evidence had no proper bearing on the possession offense — a fact-bound point on which there is no reason to review the court of appeals' determination —the court of appeals' ultimate conclusion would stand. The court's conclusion was simply that, "[i]n light of the overwhelming evidence supporting [petitioner's] conviction for possession" petitioner was not prejudiced by any misjoinder of counts or the admission of evidence relating only to the conspiracy charge (Pet. App. A10). Petitioner's claim (Pet. 5) that "crucial evidence was admitted solely because of the improper joinder of the conspiracy count" simply ignores the most important evidence cited by the court of appeals in support of its ruling — the 1.5 kilograms of cocaine found in a warrant search of petitioner's apartment (see Pet. App. A5, A10).